IN THE

Supreme Court of the United States

October Term, 1968
No. 585

THE SINCLAIR COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

AMICUS CURIAE BRIEF OF MECHANICAL SPECIALTIES COMPANY, INC.

HILL, FARRER & BURRILL,
STANLEY E. TOBIN,
KYLE D. BROWN,
445 South Figueroa Street,
Los Angeles, Calif. 90017,
Attorneys for Amicus Curiae.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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I.

INTEREST OF THE AMICUS CURIAE and PRELIMINARY STATEMENT.

Mechanical Specialties Company, Inc., is a corporation engaged in business in the manufacture of tools, gauges, special machines, missile components and nuclear components and is located in the metropolitan Los Angeles California, area. This brief is filed upon the written consent of the parties and pursuant to Rule 42(2) of the Revised Rules of the Supreme Court of the United States. Your *amicus* is the petitioner in the case of *Mechanical Specialties Company, Inc. v. NLRB,* Case No. 22,538 now pending in the United States Court of Appeals for the Ninth Circuit, which was argued and submitted on December 4, 1968. Thereafter on

January 9, 1969, the court notified your *amicus* that its case had been resubmitted pending the decision of this court in the instant case and its companion cases *NLRB v. Gissel Packing Co. and Food Store Employees Local 347 v. Gissel Packing Co. Inc.*, docket No. 573. Because of this action and since the Ninth Circuit case involving your *amicus* presents issues the same and closely related to those upon which this Court granted certiorari in the instant case it is clear that the Court's decision herein will have a significant bearing on that appeal. Accordingly, the interest of your *amicus* will be directly and significantly affected.

It is the intention of your *amicus* to devote this brief to the discussion of two major issues: (1) the propriety of the utilization of authorization cards to gain recognitional status and (2) the existence of an employer's "good-faith doubt" of union majority status and its effect upon the Board's authority to impose a bargaining order.

II.
ARGUMENT.

A. The Utilization of Authorization Cards, if Permitted at All, Should Be Limited to Situations Where Their Validity Has Clearly Been Established.

The initial issue in this case is the efficacy, if any, which is to be given to union authorization cards when a union attempts to utilize them to gain recognitional status from an employer in circumstances where the union has petitioned for, and lost, an election. It is well-recognized that authorization cards provide an extremely unsatisfactory method for determining a ma-

jority wish for representation. The National Labor Relations Board itself once acknowledged that cards were "notoriously unreliable" (*Sunbeam Corporation,* 99 NLRB 546, 550-551 [1952]) and numerous courts of appeal have subsequently indicated their emphatic agreement.[1] Nonetheless this amicus will abstain from argument with respect to the absolute preclusion of cards as a basis for recognition, leaving that to the able briefs of the parties, and will here assume that certain limited circumstances may warrant resort to cards rather than a Board-conducted election. Our point of emphasis is that the reliance upon cards in lieu of an election is so fraught with danger—to the rights of employees, employers and to labor relations stability—that this Court should not permit their utilization except with clearly defined safeguards which must certainly be more rigid than those presently employed by the NLRB.

This Court must appreciate that the much more commonly litigated issue is not whether cards may be used, *per se,* but rather, *when* may they be resorted to in lieu of the election referred to in Section 9 of the Act[2] The principal factor in determining the propriety

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[1]In addition, in a memorandum submitted to Senator Javits, former Secretary of Labor Wirtz admitted that, "[T]he procedure for determining a majority wish for union representation by means of cards is uniformly recognized as less satisfactory than a secret vote in an election." *Hearings Before the Subcommittee on Labor of the Senate Committee on Labor & Public Welfare,* 89th Cong., 1st Sess., 92-96 (1965).

[2]The following cases each involved this issue: *Atlas Engine Works v. NLRB,* 68 LRRM 2635, certiorari C.A. 6, No. 598; *Engineers and Fabricators Inc. v. NLRB,* 376 F. 2d 482 (5th Cir. 1967); *NLRB v. S.E. Nichols Company,* 380 F. 2d 438 (2d Cir. 1967); *NLRB v. The Golub Corp.,* 388 F. 2d 921 (2d Cir. 1967); *NLRB v. S.S. Logan Packing Company,* 386 F. 2d 562 (4th Cir. 1967); *Crawford Mfg. Company Inc. v. NLRB,* 386

(This footnote is continued on the next page)

of utilizing a card to establish majority status is its *validity*—does it truly reflect the desire of the employee who signed it? In each of the decided cases cited in the preceding footnote the Courts of Appeal reversed a Board finding that a union was entitled to recognition based upon an authorization card showing where the evidence demonstrated that the cards were obtained through misrepresentations, direct or indirect, as to their purpose and therefore could not be considered an unequivocal grant of authority from the employees to the union. A plethora of litigation has been caused by the Board's application of a totally unjustified and inequitable rule in judging the validity of cards. That rule, first articulated in the Board case of *Cumberland Shoe Corporation,* 144 NLRB 1268 (1964), aff'd 351 F. 2d 917 (6th Cir. 1965), is that the Board will accept at face value the language of cards signed by employees as to their intention to designate the union as their bargaining representative, unless and only unless, union solicitors of the cards have misrepresented their purpose by asserting that the cards were to be used "only" or "solely" for purposes of obtaining an election.

While the *Cumberland* rule is not directly before this Court in the instant or companion cases it must cer-

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F. 2d 367 (4th Cir. 1967) cert.den. 390 U.S. 1028, (1968); *NLRB v. Lake Butler Apparel Company,* 392 F. 2d 76 (5th Cir. 1968); *NLRB v. Swan Super Cleaners,* 384 F. 2d 609 (6th Cir. 1967); *NLRB v. Shelby Mfg. Co.,* 390 F. 2d 595 (6th Cir. 1968); *NLRB v. Dan Howard Mfg. Co.,* 390 F. 2d 304 (7th Cir. 1968); *Bauer Welding and Metal Fabricators Inc. v. NLRB,* 358 F. 2d 766 (8th Cir. 1966); *NLRB v. Southland Paint Company,* 394 F. 2d 717 (5th Cir. 1968); and pending in the Ninth Circuit Court of Appeals, *Mechanical Specialties Inc. v. NLRB,* No. 22,538 and *NLRB v. South Bay Daily Breeze,* No. 21,949.

tainly be dealt with if the Court decides that cards may support a claim for recognition. The Board's "blind" approach to the validity of cards has been rejected by almost all courts confronted with the question. Cards should not be permitted in those cases where the evidence is that their purpose was misrepresented. The Boards rule allows a union with impunity to mislead by omission, innuendo, subtlety, inference and implication. By silence the union at critical times permits employees to believe that only a union election victory could bring about unionization. By innuendo, the union may skillfully lead employees to believe that the cards may be utilized only to obtain an election; by subtlety in its choice of words, the same unjust result can be brought about; by constant harping about the impending or inevitable election, the deceiving point is achieved; and by union conduct inconsistent with the language in the card, employees are led down the primrose path.

Even the Sixth Circuit itself has recognized that the *Cumberland* rule, which it had originally affirmed, cannot be rigidly applied and has retreated from its former position. In *NLRB v. Swan Super Cleaners,* 384 F. 2d 609 (6th Cir. 1967), that court declared that any language calculated to lead an employee to believe that a holding of an election is all he had signed for is sufficient to invalidate all cards solicited under such misrepresentations. But to date the Board has never expressly rejected *Cumberland,* nor the idea that there is no misrepresentation unless the solicitor "assures" the signer that the *only* purpose of the card is an election. See *Levi Strauss & Co.,* 172 NLRB No. 57 (1968).

Assuming that cards may be used, the following approach, which most Courts of Appeal have already adopted, is one which we urge this Court to accept and promulgate: because the solicitation of authorization cards by unions is unsupervised, any representation of a solicitor misleading an employee as to the purpose of the card should be sufficient to invalidate it if the import of what was said or done indicates that an election is the end sought. Because of the recognized dangers inherent in card solicitation any conduct which suggests that signing a card signifies something less or different than a direct grant of authority for the union to act as collective bargaining agent for the employees should operate to preclude a union from claiming a majority based upon those cards.

In addition, the Board has shown a marked tendency to reject evidence of the subjective understanding of employees solicited as to the purpose of the card, on a theory akin to the parol evidence rule—that a clear and unambiguous card may not be contradicted by the contemporaneous beliefs of its signers. It is submitted that where the evidence casts a doubt upon the propriety of the method of card solicitation, the employees' subjective beliefs should be admissible. This is particularly necessary to avoid injustice where, for example, employees are shown to have a limited educational background, are unversed in the English language or demonstrate by other conduct that their intent in signing the card was contrary to its "plain meaning".

In sum, should this Court rule that unions may base refusal-to-bargain charges on an authorization card majority, either before or after an election, it should realize that the Board's past policies have served to aggravate

rather than aid in a just solution of the over-all problem and should concurrently delineate realistic standards for determining when authorization cards may, and when they may not be, so used.

B. The Court Should Establish Guidelines as to When an Employer's Good-Faith Doubt of Union Majority Status Will Insulate Him From a Bargaining Order.

The second major issue involved in the instant case is that relating to the right and duty of an employer not to recognize a union on the basis of employee authorization cards either in the absence of the commission of unfair labor practices by the employer or in their presence when at the same time, for one or more of a multitude of reasons, the employer may have possessed a good-faith doubt as to the union's majority in an appropriate unit. The Board's present *ad hoc* policy of deciding when a good-faith doubt may properly be advanced as a defense to a Section 8(a)(5) charge has lead to ambiguous, inconsistent decisions which have produced patently incongruous and illogical results. The stability and predictability of labor-management relations requires that this Court establish understandable and reasonable guidelines as to when a good-faith doubt may operate to preclude a bargaining order and thus clarify this important area of the labor law.

A whole series of Board and court decisions establish that an employer is bound to refuse the recognitional demand of a union if it possesses a good-faith doubt of that union's majority status.[3] When such a good-

[3]See, as examples, *Peoples Service Drug Stores, Inc. v. NLRB*, 375 F. 2d 551 (6th Cir. 1967); *NLRB v. Johnnie's Poultry Co.*,

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faith doubt exists the employer may insist on a Board-conducted election, for if he risks recognition and bargaining with a minority union he will have violated Sections 8(a)(1) and 8(a)(2) of the Act.

International Ladies Garment Workers Union v. NLRB, 366 U.S. 731 (1961).

Nonetheless, the good-faith doubt defense has too often received untoward and cavalier treatment, as exemplified in this case, necessitating, it is submitted, a thoroughgoing discussion of the issue by this Court. Your *amicus* submits the following propositions as reasonable and just guidelines for decision where a union seeks a bargaining order notwithstanding that it has lost a Board election:

(1) Even though an employer can produce no objective evidence justifying his good-faith doubt, that is, where such defense is a mere assertion, no bargaining order should issue in those cases where the employer has not engaged in conduct requiring that the election be set aside. *Irving Air Chute Co. Inc.*, 149 NLRB 627, 630 (1964), aff'd 350 F. 2d 176 (2d Cir. 1965). The reason is that, all things being equal, an election is preferable to cards as an indicator of employee choice. Where the election is shown to have been fairly conducted, it should control, and the good-faith, or lack of it, on the part of the employer becomes irrelevant.

(2) Where an employer merely asserts a good-faith doubt, without factual justification, and commits unfair labor practices during the pre-election period, no bar-

344 F. 2d 617 (8th Cir. 1965); *Hammond & Irving, Inc.*, 154 NLRB 1071 (1965); *McQuay-Norris Mfg. Co.*, 157 NLRB 1661 (1966).

gaining order should issue unless there is substantial evidence and a finding that such conduct *caused* the loss of the union's majority.[4]

Undoubtedly, if there is no proven causal connection between the unfair labor practices and the union's election loss, then the election has truly reflected employee sentiment, employer conduct notwithstanding, and the results should be upheld.

(3) Where the employer's defense of good faith is not accepted and he is found to have committed unfair labor practices during the critical period prior to the election which caused a loss of union majority a bargaining order should still not issue unless it is proven and found that the nature of the employer's conduct was so inimical to free employee choice as to permit the authorization card procedures to govern choice of the union rather than a second election. *NLRB v. Flomatic Corp.*, 347 F. 2d 74, 78-79 (2d Cir. 1965). On the contrary, where the employer conduct proven is, on its face, or under the evidence, sufficiently minimal so that its effects can be dispelled prior to a re-run election, then such election should be ordered, for again, elections are preferable to authorization cards. The instant case should be reversed upon this ground alone.

(4) Where the employer has not merely "asserted" a good-faith doubt, but has produced independent evidence substantiating that doubt, his defense may not be overcome by a finding of the commission of employer

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[4]The Board has stated in *McQuay-Norris Mfg. Co.*, 157 NLRB 1661, 1665 (1966),

> "It must at least appear that the unfair labor practices were committed in an effort to dissipate the union's majority, and that the unfair labor practices were in fact responsible for the loss of the union's majority."

unfair labor practices in the period before the election, no matter how numerous or how aggravated they may be. The courts and commentators have emphasized that there is no logic in the view that a good-faith doubt is negated by an employer's desire to thwart unionization by proper or even improper means. *NLRB v. River Togs, Inc.*, 382 F. 2d 198 (2d Cir. 1967). *NLRB v. James Thompson & Co.*, 208 F. 2d 743 (2d Cir. 1953). Such efforts are "as consistent with a desire to prevent the acquisition of majority status as with a purpose to destroy an existing majority." *Lesnick, "Establishment of Bargaining Rights Without an NLRB Election,"* 65 Mich. L. Rev. 851, 855 (1967).

Therefore, there is no warrant for a bargaining order (except to penalize the employer, an aim totally foreign to the purposes of the Act), unless the General Counsel of the Board succeeds in refuting the employer's evidence of good-faith doubt by *other evidence* apart from that of unfair labor practices. It must always be remembered that it is employees' rights we are expounding.

III.
CONCLUSION.

Should this Court decide that circumstances exist which may warrant giving a preference to authorization cards over a Board-conducted election as an indicator of employee choice, in that event your *amicus* submits that the limitations thereon suggested in this brief be adopted.

Respectfully submitted,

HILL, FARRER & BURRILL,
STANLEY E. TOBIN,
KYLE D. BROWN,
Attorneys for Amicus Curiae.